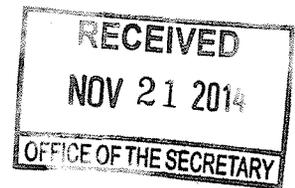


UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION



In the Matter of

JESSE C. LITVAK

Administrative Proceeding  
File No. 3-16050

November 20, 2014

DECLARATION OF PATRICK J. SMITH

Patrick J. Smith, hereby declares, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

1. I am a partner with the law firm DLA Piper LLP (US), counsel to Respondent Jesse C. Litvak ("Litvak" or "Respondent") in these proceedings brought by the Division of Enforcement of the Securities and Exchange Commission ("SEC"). I submit this Declaration in support of Respondent's Opposition to the SEC's Motion for Summary Disposition.

2. Attached as Exhibit A is a true and correct copy of the Status Conference Telephonic Transcript from *SEC v. Litvak*, 3:13-cr-00132 (JCH), dated October 14, 2014.

Executed on November 20, 2014, New York, New York.

  
Patrick J. Smith



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UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

Securities and Exchange	)	
Commission,	)	October 14, 2014
Government	)	3:33 p.m.
v.	)	
Jesse C. Litvak	)	3:13cr132 (JCH)
Defendant.	)	
	)	

141 Church Street  
New Haven, Connecticut

TELEPHONIC CONFERENCE

B E F O R E:  
THE HONORABLE JANET C. HALL, U.S.D.J.

A P P E A R A N C E S:

For The Securities	:	Rachel E Hershfang
and Exchange		Securities & Exchange Commission
Commission		33 Arch St., 23rd Fl.
		Boston, MA 02110-1424

For The Government	:	Jonathan N. Francis
		U.S. Attorney's Office
		157 Church St., 23rd floor
		New Haven, CT 06510

For the Defendant	:	Michael Chase
		Shipman & Goodwin
		One Constitution Plaza
		Hartford, CT 06103-1919
		Patrick Smith
		Sarah B. Zimmer
		DLA Piper US LLP
		1251 Avenue of the Americas,
		27th Floor
		New York, NY 10020-1104

1           THE COURT: Good afternoon. This is Judge Hall  
2 speaking and I hope I have counsel on the line in matter of  
3 the SEC versus Litvak, case number 313CR132. If I can have  
4 appearances please.

5           MS. HERSHFANG: On behalf of the Security and  
6 Exchange Commission, Rachel Hershfang.

7           MR. SMITH: Patrick Smith and Sarah Zimmer for Mr.  
8 Litvak who is listening on the line.

9           MR. CHASE: Mike Chase from Shipman and Goodwin on  
10 the line for Mr. Litvak.

11          MR. FRANCIS: Jonathan Francis for the United  
12 States.

13          THE COURT: I scheduled this because the criminal  
14 case is over and judgment has entered in the matter so its on  
15 its way to appeal, but this case is stayed, and it was my  
16 view that I wondered why it still had to be stayed. I don't  
17 like stayed cases. I guess if someone wants to tell me they  
18 still want it stayed, you will have to tell me a good reason.

19          MR. SMITH: Patrick Smith here. We think it should  
20 be stayed pending the appeal. My understanding the SEC would  
21 move for summary judgment based upon that conviction, and the  
22 parties would be briefing whether a summary judgment is  
23 appropriate at this juncture based on the conviction, the  
24 appeal still pending. The appeal will work itself out in  
25 eight or ten months. We can save ourselves a lot of effort

1 and expense by awaiting the outcome of the appeal, then I  
2 think the matter will resolve itself either way pretty  
3 quickly.

4 THE COURT: I would like to know exactly what you  
5 mean by that. I understand if there's a reversal, it won't  
6 resolve itself quickly. I would expect the SEC will decide  
7 whether to proceed with the matter even in the absence of a  
8 criminal conviction. Would that be a fair assumption,  
9 Attorney Hershfang?

10 MS. HERSHFANG: Yes.

11 THE COURT: That would not be a quick resolution if  
12 the outcome is the judgment is affirmed. Is it Mr. Litvak's  
13 intention in effect to concede judgment in the civil case?

14 MR. SMITH: I think the Security and Exchange  
15 Commission would move for summary judgment, but we wouldn't  
16 have to bother litigating the issue about whether or not the  
17 issue is ripe at this time given the appeal still pending. I  
18 think that the time and effort and expense associated with  
19 that would be wasteful. At this point, the relief the SEC  
20 would obtain to go forward to get a judgment on the merits in  
21 the case, may not be anything incremental. I say that  
22 because your Honor imposed a substantial fine in the criminal  
23 case which may not be duplicated here or might not be  
24 duplicated here. In terms of barring Mr. Litvak from the  
25 securities industry, the commission has filed a parallel

1 administrative proceeding to achieve that remedy. That's  
2 being taken care of by an AOJ before the SEC.

3 THE COURT: Is that stayed?

4 MS. HERSHFANG: No. It is not, your Honor. That's  
5 going forward. We have a briefing schedule over the next  
6 month and a half or so.

7 THE COURT: To listen to Attorney Smith, Attorney  
8 Hershfang, it sounds like this civil case in front of me is  
9 really a waste of time. He's either going to get the  
10 conviction affirmed in which case, I've already done  
11 everything or the administration proceeding will cover  
12 whatever I didn't do. If the conviction gets reversed, he's  
13 not convicted of the felony, then I guess all bets are off  
14 so. I don't see, Attorney Smith, how it's such a waste of  
15 time. What's the waste of time? It sounds like we're going  
16 to have a battle no matter what. If you told me if the  
17 conviction was affirmed that, in effect, you would be  
18 confessing judgment here, we would be arguing over the money,  
19 any penalties or disgorgement or an injunction which are the  
20 remedies sought by the SEC, then I might agree with you, but  
21 I don't hear you saying that. You don't have to say that.  
22 It is fine you don't.

23 MR. SMITH: I don't think we have to confess  
24 judgment. I think it's more or less straightforward and  
25 automatic. There aren't many defenses to liability at that

1 point. Here you have this issue about whether or not they  
2 are entitled to that relief based upon a conviction where the  
3 appeal is still pending and that's the wasteful piece. We  
4 don't need to be litigating that. Within eight or nine  
5 months, we should know. My suggestion is let's not put Mr.  
6 Litvak and Jefferies to the expense of litigating that. It  
7 is Jefferies in the first instance still, but the cost of  
8 defending this issue ultimately circles back to Mr. Litvak.  
9 I think at this stage of the litigation would be wasteful  
10 when we know that in eight months, we can just skip right  
11 over it.

12 THE COURT: The eight months you have from whom?

13 MR. SMITH: I'm estimating how long it will take for  
14 the appeal to be decided. Somewhere in the eight to ten  
15 month range. The briefing schedule, the initial brief is due  
16 before the end of the year.

17 THE COURT: Does the SEC have a position on the  
18 continued stay?

19 MS. HERSHFANG: Your Honor, it is the SEC's position  
20 in cases in this procedural posture that the stay is no  
21 longer necessary and that the case should continue forward.

22 THE COURT: What would you intend to do if I were to  
23 agree with you? What would the SEC begin to do by way of  
24 pressing this case?

25 MS. HERSHFANG: Your Honor, I don't think that

1 Mr. Smith is at all wrong about the likely procedural steps.  
2 I also don't think his arguments -- I will stop that. I was  
3 going to multiple negatives. I think his arguments have  
4 merit about the possibility of wasted effort on the part of  
5 the parties and the Court. Having said that, I'm not  
6 particularly persuaded by the notion that it is a pending  
7 appeal that throws a procedural wrench into the summary  
8 judgment work. It would be our intention to move forward  
9 with the motion for summary judgment on the basis of the  
10 criminal conviction. The part of Mr. Smith's argument that  
11 makes a lot of sense to me obviously is the part where if the  
12 Court were to go ahead and decide that motion arguably in the  
13 SEC's favor, then the Second Circuit were to reverse the  
14 criminal conviction, the effort of the Court in considering  
15 that motion and the parties in briefing it, would be wasted  
16 so I think that's accurate.

17 THE COURT: Does the intervenor have any comment?

18 MR. FRANCIS: The government doesn't have a dog in  
19 the fight. Can you hear me?

20 THE COURT: I can now.

21 MR. FRANCIS: While the government doesn't have a  
22 dog in the fight with respect to the SEC's action against Mr.  
23 Litvak going forward just with respect to the commentary on  
24 what the appeal is. Although I don't know what the SEC's  
25 motion for summary judgment is going to be, but the grounds

1 of the appeal that Mr. Litvak has sort of flagged for the  
2 Second Circuit so far go to the sufficiency of the evidence,  
3 with one respect to jury instructions and then to whether or  
4 not your Honor was correct to preclude expert testimony and  
5 certain documents. So there doesn't seem to me to be  
6 necessarily the case that any one of those issues really  
7 would stand in the way of summary judgment.

8 Like I said, I don't really know exactly how the SEC  
9 would frame their motion for summary judgment, absent the  
10 criminal conviction, but there's no necessary logical reason  
11 why even if the appellate court were to agree with Mr. Litvak  
12 on one of those grounds, why that would necessarily mean the  
13 SEC couldn't win summary judgment on this case from the  
14 evidence that your Honor is already well familiar with.

15 THE COURT: The Court is going to continue the stay  
16 but it requests -- it is not really inclined to continue it,  
17 but I will leave it in place pending. I will ask for another  
18 motion to continue the stay in effect after the jury verdict  
19 and request that, I assume it will be Mr. Litvak who will  
20 make that motion, that would be due by November 7, opposition  
21 by November 28 and a reply by December 12. I would expect to  
22 rule on it shortly after it is joined. Obviously if I grant  
23 it, the stay continues. If I don't, that will terminate the  
24 stay and if I do that and you want a conference on  
25 scheduling, that's fine. You can ask for it. If you want to

1 propose a schedule, that's fine as well. Obviously if I  
2 continue the stay, you don't have to do anything. Is there  
3 anything further? Thank you very much.

4 (Whereupon, the above hearing adjourned at 3:43  
5 p.m.)

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9 COURT REPORTER'S TRANSCRIPT CERTIFICATE

10 I hereby certify that the within and foregoing is a true and  
11 correct transcript taken from the proceedings in the  
12 above-entitled matter.

13

14 /s/ Terri Fidanza

15 Terri Fidanza, RPR

16 Official Court Reporter

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